BANK OF TOKYO-MITSUBISHI (MALAYSIA) BHD

v.

POONG LIM (M) SDN BHD & ORS

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
RAHMAH HUSSAIN JCA
VINCENT NG J
[CIVIL APPEAL NO: W-02-237-2000]
5 JULY 2005

BANKING: *Security - Deposit of shares - Sale of shares by bank - Valuation of market price of shares, practical approach to*

WORDS & PHRASES: *Shares - Market price v. market value*

SECURITIES: *Shares - Sale of shares by bank - Valuation of market price of shares, practical approach to*

By an agreement dated 4 November 1975, the first and second respondents jointly and severally agreed and acknowledged that the first respondent owed the appellant a sum of RM430,217.25, and further requested the appellant to grant the first respondent time to settle the amounts outstanding and to forebear from suing the first respondent for the recovery of the said amount. Further, the second and third respondents each entered into a contract of guarantee dated 4 November 1975 in favour of the appellant. In the guarantee between the appellant and the second respondent, the second respondent agreed to pay the appellant all amounts outstanding to the appellant on demand. As security for the guarantee, the second respondent deposited certain shares, which included *inter alia,* one lot of Tan Chong Motor Holdings Bhd shares, amounting to 61,000 shares. On 18 November 1975, in an attempt to redeem the Tan Chong shares, the first and second respondents offered to pay to the appellant RM80,000 being the market price of the 61,000 shares. The appellant refused the offer and instead demanded approximately RM90,000 on the ground that this represented the market price of the Tan Chong shares as at 18 November 1975. Upon the respondents' rejection of this demand, the appellant sold the shares and recovered RM91,391.70. The appellant thereafter sued the respondents to recover the amounts outstanding under the guarantees. The first and second respondents counterclaimed for damages and costs arising out of the appellants refusal to accept their offer of RM80,000. The second and third respondents also contended that they were discharged from their obligations under the guarantees upon the appellant's failure to return the shares to them. At first instance, the High Court found that the return of the Tan Chong shares

was a condition precedent to the guarantors' obligation under the guarantees and that the appellant's refusal to accept the RM80,000 offer and to return the same had discharged the first and second respondents from the guarantor obligations. The High Court thus allowed with costs the appellant's claim against the first respondent; dismissed with costs the appellant's claim against the second and third respondents; allowed with costs the first and second respondents' counterclaim against the appellant; and allowed the first and second respondents dividends accrued on the Tan Chong shares. The appellant appealed to the Court of Appeal arguing that the first and second respondents had failed to tender the market price of the shares.

Held (allowing the appeal with costs)
Per Vincent Ng J:

[1] The High Court judge seemed to have treated the word 'market price' and 'market value' as synonymous, which caused him to fall into error. The judge erred in not giving any or due weight to DW2 evidence on what was the 'market price'. The expression 'the market price' denoted an available ascertained fixed figure whereas 'market value' suggested the use of a certain formula to ascertain the fixed figure. On the facts, the appellant correctly took the quoted price of Tan Chong shares as at 18 November 1975 – RM1.46 per share, multiplied it by the total number of shares pledged – 61,000 shares, produced the figure RM89,060 and demanded the sum of RM90,000. This was a practical approach taken by the appellant, especially from a banker's point of view. This was also a particularly accepted practice in the banking world. This must have been what the parties had intended, bearing in mind that due to the exigencies of commercial practice, a bank could not be expected to have the worth of a share evaluated in the open market on a daily and expeditious basis. By offering to pay RM80,000, the respondents were in breach of cl. 1(d) of the agreement. (pp 848 g-h & 850 b-f)

*[**Bahasa Malaysia** Translation Of Headnotes*

Melalui perjanjian bertarikh 4 November 1975, responden pertama dan kedua secara bersesama dan bersendirian bersetuju dan mengaku bahawa responden pertama telah berhutang kepada perayu sebanyak RM430,217.25, dan seterusnya meminta supaya perayu memberikan masa kepada responden pertama bagi melangsaikan hutangnya itu dan tidak mendakwa responden pertama untuk mendapatkan kembali hutang tersebut. Selain itu, pada tarikh yang sama, responden kedua dan ketiga setiap seorangnya memeterai satu kontrak gerenti bagi manfaat perayu. Dalam gerenti di antara perayu dan responden kedua,

responden kedua bersetuju untuk membayar perayu segala jumlah yang terhutang kepada perayu atas tuntutan. Sebagai jaminan kepada gerenti, responden kedua mendeposit sejumlah saham, yang antara lain termasuk satu lot saham Tan Chong Motor Holdings Bhd berjumlah 61,000 saham kesemuanya. Pada 18 November 1975, sebagai percubaan untuk menebus saham-saham Tan Chong tersebut, responden pertama dan kedua menawarkan RM80,000, iaitu bersamaan dengan harga pasaran 61,000 saham berkenaan. Perayu menolak tawaran dan sebaliknya menuntut RM90,000 atas alasan bahawa ia lebih mencerminkan nilai saham-saham Tan Chong itu setakat 18 November 1975. Responden-responden menolak tuntutan perayu ini, dan akibatnya perayu menjual saham-saham tersebut dengan memperoleh hasil sebanyak RM91,391.70. Perayu kemudian mendakwa responden-responden bagi mendapatkan baki yang masih terhutang di bawah gerenti. Responden pertama dan kedua membalas dengan menuntut gantirugi dan kos yang berbangkit dari keengganan perayu menerima tawaran mereka yang berjumlah RM80,000 di atas. Responden kedua dan ketiga juga berkata bahawa mereka telah dilepaskan dari tanggungan di bawah gerenti atas kegagalan perayu mengembalikan saham-saham kepada mereka. Di pendengaran pertama, Mahkamah Tinggi mendapati bahawa pemulangan saham-saham Tan Chong adalah syarat duluan kepada obligasi penjamin-penjamin di bawah gerenti, dan bahawa keengganan perayu untuk menerima tawaran sebanyak RM80,000 dan memulangkan saham-saham telah melepaskan responden pertama dan kedua dari obligasi-obligasi mereka sebagai penjamin. Mahkamah dengan itu membenarkan dengan kos tuntutan perayu terhadap responden pertama; menolak dengan kos tuntutan perayu terhadap responden kedua dan ketiga; membenarkan dengan kos tuntutan-tuntutan balas responden kedua dan ketiga terhadap perayu; dan membenarkan kepada responden pertama dan kedua dividen yang terakru atas saham-saham Tan Chong. Perayu merayu ke Mahkamah Rayuan sambil berhujah bahawa responden pertama dan kedua telah gagal menawarkan harga pasaran saham-saham berkenaan.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Vincent Ng H:

[1] Hakim Mahkamah Tinggi nampaknya telah menyamakan perkataan ‘harga pasaran’ dan ‘nilai pasaran’ sekaligus menyebabkan beliau khilaf. Hakim khilaf kerana tidak memberi sebarang tekanan atau tekanan wajar kepada keterangan DW2 bersabit apa itu ‘harga pasaran’. Ekspresi ‘harga pasaran’ bermakna harga yang telah ditetap dan dikenalpasti sementara ‘nilai pasaran’ memberi maksud tentang penggunaan suatu formula bagi mempastikan harga tersebut. Di atas fakta, perayu dengan betulnya mengambil harga tersenarai saham Tan Chong setakat 18 November 1975

– RM1.46 se saham, mendarabkannya dengan jumlah saham yang didepositkan – 61,000, mendapat angka RM89,060 dan menuntut sejumlah RM90,000. Ini satu pendekatan praktikal yang diambil oleh perayu, terutama dari kacamata seorang pemberi pinjaman. Ini juga satu amalan yang diterima dalam dunia perbankan. Ini semestinya adalah apa yang diniatkan oleh pihak-pihak, mengambilkira bahawa berdasarkan amalan komersial, bank tidak boleh dijangkakan untuk membuat penilaian saham di pasaran terbuka atas dasar harian dan dengan serta merta. Dengan menawarkan RM80,000, responden-responden sebenarnya telah melanggar perenggan 1(d) perjanjian.

For the appellant - Sulaiman Abdullah (Anita Sockalingam with him); M/s Zain & Co

For the respondents - KS Narayanan (T Gunaseelan, A Vishnu Kumar & John Skelchy with him); M/s Gunaseelan & Assoc

[Appeal from High Court, Kuala Lumpur; Suit No: 130-1976]

Reported by Andrew Christopher Simon

JUDGMENT

Vincent Ng J:

Facts And Background

By an agreement entered into on 4 November 1975 the 1st and 2nd defendants/ respondents (respondents) jointly and severally agreed and acknowledged that a sum of RM430,217.25 was due and owing to the plaintiff/appellant (appellant) as at 4 November 1975 together with further interest, and requested the appellant to grant the 1st respondent further time to settle the amounts outstanding and to forebear from suing the 1st respondent forthwith for recovery of the said amount. The 2nd and 3rd respondents had also each entered into a contract of guarantee, both dated 4 November 1975 in favour of the appellant. In the guarantee between the appellant and the 2nd respondent, the latter agreed to pay the appellant all amounts outstanding to them on demand. As security for this guarantee, the 2nd respondent deposited certain shares, which included, *inter alia*, one lot of Tan Chong Motor Holdings Berhad amounting to 61,000 shares (the Tan Chong shares). Clause 1(b) of this guarantee states as follows:

> (b) The Company (First Respondent) and or Dr. Chen (Second Respondent) shall within fourteen (14) days from the date of this Agreement deliver to the Bank (Appellant) **a Banker's Order equivalent to the market price of 61,000 Tan Chong Motor Holdings Berhad shares at the time of such delivery** in exchange for which the Bank shall return the Company the 61,000 Tan Chong Motor Holdings Berhad shares. (emphasis added)

By the statement of agreed facts dated 10 February 1981, the following facts were agreed between the parties. On 18 November 1975, in an attempt to redeem the Tan Chong shares, the 1st and 2nd respondents offered to pay to the appellant the sum of RM80,000 being (according to the respondents) the market price of the said 61,000 Tan Chong shares as at 18 November 1975. The appellant refused to accept that offer and in turn stated that they were prepared to accept the sum of approximately RM90,000 on the ground that this sum represented the market price of the said Tan Chong shares as at 18 November 1975. It was also common ground that the price quoted for each Tan Chong share on 18 November 1975 in the Kuala Lumpur Stock Exchange was RM1.45. When the appellant's demand for approximately RM90,000 was rejected by the respondents, the appellant proceeded to sell the said Tan Chong shares. All of the said Tan Chong shares were sold during the period between 24 November 1975 to 18 December 1975 and the appellant recovered proceeds totalling RM91,391.70.

On 21 February 1976, the appellant sued the respondents for the amounts outstanding under the guarantees. In the same suit, the 1st and 2nd respondents counterclaimed for damages and costs arising out of the appellant's refusal to accept their offer of RM80,000 and for the return of the said Tan Chong shares. Apart from that, the 2nd and 3rd respondents also contended that upon the appellant's failure to return the said Tan Chong shares to them, they were discharged from their obligations under the guarantees.

On 25 March 2000 the learned High Court Judge found that the return of the said Tan Chong shares was a condition precedent to the guarantors' obligation under the guarantees, and that the appellant's refusal to accept the offer of RM80,000 for redemption of the Tan Chong shares and to return the same, had discharged the 1st and 2nd respondents from their further obligation under the guarantees.

The learned judge then:

(a) allowed with costs the appellant's claim against the 1st respondent in the sum of RM230,035 with 12% interest per annum (simple interest) from 26 December 1975 to date (25 March 2000), ie, pre-judgment interest and with interest at 8% per annum on judgment sum till date of realisation, ie, post-judgment interest;

(b) dismissed the appellant's claim with costs against the 2nd and 3rd respondents;

(c) allowed the 1st and 2nd respondents' counterclaim with costs against the appellant, ie, damages – value of 335,332 shares x $6.50 per share as at 12 February 1981 with interest at 8% from 12 February 1981 to date of judgment and thereafter 8% on judgment sum till date of realisation; and

(d) allowed the 1st and 2nd respondents, dividends accrued on the said Tan Chong shares (which had ballooned to 335,332 as at the date of trial on 12 February 1981) amounting to RM134,453.75, with interest at 8% per annum from 12 February 1981 till to date and thereafter on the judgment sum at 8%.

The appellant's appeal before us is based on the grounds that:

(i) the learned judge erred when he awarded the appellant simple interest and not compound interest;

(ii) the learned judge erred when he dismissed the appellant's claim against the 2nd and 3rd respondents as guarantors on the ground that the condition precedent to the guarantees was not met by the bank; and

(iii) the learned judge erred when he allowed the 1st and 2nd respondents' counterclaim and held that they had fulfilled their obligation under the guarantees when they offered to pay RM80,000 to redeem the shares.

The Appeal

The appellant eventually abandoned ground (i) above when its learned counsel Tuan Hj Sulaiman Abdullah conceded that the appellant had not prayed for compound interest.

As regards grounds (ii) and (iii), the sole thrust and crux of the appellant's contention before us is that the appellant was never in breach of the bargain, because the obligation of the 1st and 2nd respondents was to tender the market price of the said Tan Chong shares which they had failed to do, as the agreement says 'market price' and not 'market value'.

Our Decision

It is plain from the evidence adduced at the trial (unfortunately there was no written judgment) that the learned judge's decision in the court below to allow the counterclaim was solely grounded on his construction of the word 'market price'. With greatest respect he seems to have treated the words 'market price' and 'market value' as synonymous, which, in our view caused him to fall into error in his approach. Notably, cl. 1(b) of the agreement use the expression 'market price' and not 'market value'. The distinction between the two is of vital importance, considering that the decision on whether to allow

the counterclaim turns solely on determination of what was the market price, rather than the market value, of the said Tan Chong shares 'at the time of delivery'. Clearly, the question now before this court is: "What was the intention of the parties as to the market price?".

It is common ground between the parties that for the purpose of evaluation of the said Tan Chong shares the date 18 November 1975, should be taken as a peg, pursuant to cl. 1(b) of the agreement which states "equivalent to the market price of 61,000 Tan Chong Motor Holdings Berhad shares at the time of such delivery", and the date of delivery "shall be within 14 days from the date of this agreement" (the date of agreement being 4 November 1975). Thus, on the question of what was the 'market price' of the shares on 18th November 1975, the onus is on the respondents to show that it was RM80,000 or thereabouts.

To establish what was the market price of the Tan Chong shares, the respondents called Tengku Noone Aziz bin Tengku Mahmood (DW2), the then Chairman of the Kuala Lumpur Stock Exchange, as their witness. In his examination-in-chief he said that on 18 November 1975 the price quoted for Tan Chong shares was RM1.46 (this was also an agreed fact), and in favour of the respondents, he said: "If one has to value 61,000 Tan Chong shares on that day, one has to allow for a discount because the shares are disposed of in bulk. This is known as a blockage factor. It is known as a block deal. If I were to buy this 61,000 on that day I would ask for a 5% to 15% discount. We may arrive at 10% discount in normal circumstances. Therefore RM1.46 x 61,000 = RM89,060 less 10% = RM80,154" (see p. 48 of the Record of Appeal). If we are to consider carefully this part of his evidence we find that, at the very most, he was, in effect, only talking about the market value of Tan Chong shares rather than market price.

Our considered opinion on this aspect of his evidence is further fortified as, further down in his evidence, when under cross-examination, this particular witness for the respondents also testified, in our view quite adversely to the respondents' case, (see p. 49 of the Record of Appeal) that:

> If someone asks me for the market price of a particular share, then of course, I would look at the board which will show the quoted price.
>
> Question: If you are asked to value for a banker, how would you do it?
>
> Answer: Normally, they would ask for the quoted price. **I would look at the board for the quoted price.**

If you ask for the market value, then it is the value that can be fetched in the open market.

The **discount is not a constant factor**. It could vary from share to share.

Thus, we are of the opinion that, with due respect, the learned judge in the court below was completely amiss in not giving any or due weight to this feature of DW2's evidence on what was the 'market price'. Surely, the expression 'the market price' denotes an available ascertained fixed figure, whereas 'market value' connotes use of a certain formula to ascertain the fixed figure; DW2's earlier testimony constituted an effort towards such formula-based ascertainment of the market value. The appellant, quite rightly in our opinion, took the quoted price of Tan Chong shares as at 18 November 1975 (agreed by the parties as RM1.46), multiplied it by the total number of shares pledged (that is, 61,000 shares), which produced the figure RM89,060, and demanded the sum of RM90,000.

In our view, not only is this a practical approach taken by the appellant, especially from a banker's point of view, but it is also a particularly accepted practice in the banking world. To our mind, clearly, this must have been what the parties had intended, bearing in mind that due to the exigencies of commercial practice we cannot expect the bank to have the worth of a share evaluated in the open market on a daily and expeditious basis.

We would thus hold that by offering to pay the sum of only RM80,000 to the appellant, the respondents were in breach of cl. 1(d) of the agreement. Therefore, after having carefully considered the recorded evidence we have decided to allow the appeal and reverse the order of the High Court pertaining to the counterclaim. The counterclaim is dismissed and the appellant is allowed interests as prayed against the 2nd and 3rd respondents, with costs here and below on both the claim and the counterclaim. The order of the learned judge on the claim is affirmed save the part which is not inconsistent with this order.

Gopal Sri Ram JCA:
I have read the draft judgment of my learned brother Vincent Ng Kim Khoay J and I concur with it.